

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND) MDL NO. 13-2419-FDS
COMPOUNDING)
PHARMACY CASES LITIGATION)

BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

STATUS CONFERENCE

John Joseph Moakley United States Courthouse
Courtroom No. 2
One Courthouse Way
Boston, MA 02210

June 11, 2013
2:00 p.m.

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PROCEEDINGS

THE CLERK: All rise. Thank you. Please be seated. Court is now in session in the matter of in re: New England Compounding Pharmacy, Incorporated Products Liability Litigation. This is Case Number 13-MD-02419. Counsel, please note your appearances for the record.

MS. PARKER: Good afternoon, your Honor, Kristen Johnson Parker for the plaintiffs' steering committee.

02:02PM THE COURT: Good afternoon.

MS. DOUGHERTY: Good afternoon, your Honor, Kim Dougherty, plaintiffs' steering committee.

MR. ZAMORA: Hello, Judge, Mark Zamora, plaintiffs' steering committee.

MR. FENNEL: Good afternoon, Judge, Patrick Fennell for plaintiffs' steering committee.

THE COURT: Good afternoon, all. Back table for plaintiffs'.

02:02PM MR. MOLTON: Good afternoon, your Honor, David Molton from Brown, Rudnick for the official creditors' committee.

MS. ANDREWS: Good afternoon, your Honor, Anne Andrews, co-chair of the official creditors' committee.

MR. COREN: Good afternoon, your Honor,

1 Michael Coren, co-chair of the official creditors'
2 committee.

3 MR. ELLIS: Rick Ellis, various plaintiffs.

4 MR. GALLIGAN: Your Honor, Mike Galligan,
5 creditors' committee liaison with the PSC.

6 MR. GOTTFRIED: Michael Gottfried for Paul
7 Moore, trustee.

8 MR. FERN: Good afternoon, Judge, Frederick
9 Fern from Harris, Beach, NECC liaison counsel.

02:02PM 10 MR. TRANEN: Daniel Tranen, NECC.

11 MS. SAMSON: Good afternoon, your Honor,
12 Nikki Samson for Medical Sales Management, Inc.

13 MR. NADEL: Good afternoon, your Honor,
14 Heidi Nadel for Doug and Carla Conigliaro.

15 MR. MORIARTY: Good afternoon, your Honor,
16 Matt Moriarty for Ameridose.

17 THE COURT: Good afternoon, all. We are
18 joined, as usual, by a number of lawyers on the
19 telephone. I have the agenda in front of me, the

02:03PM 20 proposed agenda which I guess I propose to follow. You
21 all have received my order and memorandum on the motion
22 to transfer cases. We'll get to that in due course, but
23 let me hear first on item Number 1, which is the status
24 of proposed case management order, protective orders and
25 medical release.

1 Ms. Parker.

2 MS. PARKER: Good afternoon, your Honor, the
3 plaintiffs' steering committee along with the creditors'
4 committee have been working diligently with the
5 defendants in this matter to put together a
6 comprehensive case management order that would address,
7 among other things, discovery, filing of master
8 complaints as well as possibly tolling agreements and
9 mediation or settlement protocols for un affiliated
10 defendants, referring to defendants other than NECC.

02:04PM

11 We had a very productive meet and confer
12 this morning, your Honor. I believe that we have
13 resolved the vast majority of our disagreements on that,
14 and we look forward to presenting a case management
15 order to you shortly.

16 It is our hopes to have that case management
17 order filed on Friday. We understand that your Honor is
18 away for the next several weeks, and so we're trying to
19 get that to you quickly. It is possible that in order
20 to do that, we may wind up filing competing proposals on
21 particular paragraphs. We hope that that will not be
22 the case. That case management order goes hand-in-hand
23 with two protective orders that the parties are working
24 on.

02:04PM

25 The first is a qualified protective order to

1 deal with information that is privileged under --
2 protected under HIPAA, the health insurance -- let's see
3 if I can do it, the Health Insurance Portability Act.

4 THE COURT: HIPAA.

5 MS. PARKER: Close enough, sorry, and also
6 various state law provisions that protect health
7 information. We intend to put before you an agreed upon
8 order that is the type of order that has been entered in
9 other MDLs to deal with protected healthcare information
10 and to explain why we're pushing that order now, your
11 Honor.

12 As we have described, I believe, to the
13 Court at the last status conference, the plaintiff
14 steering committee is ready to serve subpoenas on pain
15 clinics asking them for information about their
16 purchases and interactions with NECC as well as the
17 names of individuals who received NECC products.

18 We are not asking for medical records from
19 those entities. We are, however, asking for names of
20 patients that received products. Because that
21 information would be covered under HIPAA, we are asking
22 that the Court enter a protective order that would
23 specifically deal with how that information is produced
24 and where it is stored.

25 The idea is to identify a HIPAA compliant

02:05PM

02:05PM

1 vendor that we have issued requests for qualifications
2 in that regard and to have all of the information
3 produced to the HIPAA-compliant vendor where it would be
4 held in a black box pending further order of this Court.

5 One of the purposes for collecting all of
6 that information has to do ultimately with ensuring that
7 notices provided to claimants of the bankruptcy. There
8 are other purposes in collecting that information as
9 well, which go to establishing the liability of NECC as
10 well as the pain clinics and other potential defendants.

02:06PM

11 So from the plaintiffs' perspective, the
12 qualified protective order is a necessary prerequisite
13 to having the pain clinics produce information in
14 response to our subpoena discovery efforts.

15 Now, the meet and confer with the defendants
16 on this has been very positive. I don't believe we've
17 had any serious significant concerns raised by any of
18 the defendants about this particular proposed order, but
19 I understand that the defendants are going to get back
20 to us hopefully shortly with any further comments, and
21 it is our hope that we file that order, the qualified
22 protective order, by Thursday.

02:07PM

23 THE COURT: All right. In terms of my own
24 schedule, I am going to be in Washington next week. I
25 will be on vacation the week after that. My enthusiasm

1 for working on things will be higher when I am in
2 Washington than when I'm on vacation, and if it really
3 is agreed to, and I have a chance to read it, I can get
4 it out fairly quickly. Obviously, the fewer disputes,
5 the easier it will be for me to do that, but I will do
6 my best.

7 MS. PARKER: One final comment, as
8 contemplated in the case management order, there would
9 be an opportunity for anyone who objected to the
10 subpoena and the information requested in the subpoena
11 to appear before this Court to lodge any objections
12 thereto, so simply because we have a qualified
13 protective order in place does not necessarily mean that
14 we will in fact wind up receiving all of that
15 information, or put differently, there's an opportunity
16 for everyone to object.

17 THE COURT: All right. Who wants to take
18 the lead for the defense in responding?

19 MR. FERN: I'll be glad to.

20 THE COURT: Mr. Fern.

21 MR. FERN: Thank you, your Honor. Not much
22 to add to what Ms. Parker has shared with the Court.
23 The qualified protective order I do not believe there
24 will be much in controversy there, and Thursday filing
25 should be quite possible. Again, we -- that is more so

1 to protect the plaintiffs and the various healthcare
2 providers to whom those subpoenas are being served.
3 NECC and what we call the affiliated defendants really
4 do not have much influence or input into those
5 responses.

6 As to the protective order, we have
7 negotiated an informal discovery demand with the
8 steering committee. That is being worked on. My office
9 has people going through those documents, reviewing them
10 for various privileges that might apply. As soon as the
11 protective order can be agreed upon, submitted to the
12 Court to be so ordered, then we will start the rolling
13 production of documents. That will, for the most part,
14 allow the PSC to identify what they call the national
15 defendants, the potential defendants who were involved
16 with work at NECC as well as state specific defendant of
17 various healthcare providers who provided the injections
18 to the individuals in their home states.

19 So that protective order should be back by
20 the end of the week, assuming that we can agree on it
21 with the steering committee. Again, you should see that
22 early next week I anticipate, your Honor.

23 THE COURT: All right. Does anyone want to
24 be heard on that topic, anyone from the plaintiffs' side
25 of the house? From the defense? Trustees, any other

1 interested observers? All right. Good. Topic 2,
2 Ms. Parker.

3 MS. PARKER: So we've covered the CMO, your
4 Honor. In terms of the mediation order, the plaintiffs
5 are drafting, and, again we'll meet and confer with the
6 defendants as appropriate as to a mediation program or
7 protocol that would pertain to the unaffiliated
8 defendants, meaning defendants other than those that are
9 affiliated with NECC.

02:10PM 10 I'm not going to promise the timing on that,
11 your Honor, but I will say that it is something we are
12 actively working through and we hope to have to you very
13 soon.

14 THE COURT: All right. Anyone want to be
15 heard on that topic?

16 MR. MOLTON: Your Honor, David Molton for
17 the respective creditors' committee. I just want to
18 place that in context. As your Honor knows, the
19 affiliated defendants are presently engaged in
02:11PM 20 settlement discussions with the trustee pursuant to the
21 bankruptcy court-entered protocol.

22 What the mediation order as contemplated by
23 the CMO -- and there will be a provision in the CMO that
24 will discuss that and provide a time frame for
25 delivering a proposed order to your Honor -- does is

1 provide the analog to that consensual set resolution
2 mechanism that's being utilized by the trustee, but this
3 time in terms of the nonaffiliated defendants, and
4 hopefully it will provide incentives for nonaffiliated
5 defendants, unaffiliated defendants, to join in a
6 mediation program that can quickly and expeditiously
7 bring everybody to possible resolution.

8 THE COURT: All right. Item 3, status of
9 discovery efforts. Ms. Parker.

02:12PM

10 MS. PARKER: So the plaintiffs have prepared
11 subpoenas that are ready to go out, your Honor. As I
12 mentioned, we're waiting for the entry of a qualified
13 protective order. I say waiting. That's on us to
14 submit it to you, certainly not waiting for the Court.

15 There is one issue that I wanted to preview
16 with you there. As contemplated in the case management
17 order, there would be -- let me back up. The plaintiffs
18 intend to issue all of these subpoenas out of the MDL
19 and believe that they would all be centrally enforceable
20 by this Court in this district.

02:12PM

21 We have contemplated two things in that
22 regard. The first is to submit to your Honor a simple
23 motion that asks you to enter an order that instructs
24 that any objections to the subpoenas should be filed in
25 this district before this Court, and that motion will

1 provide some of the legal authority for your Honor to do
2 that, but I will note that these are all depositions,
3 I'm sorry, these are all subpoenas that are seeking
4 depositions of recordkeepers as well as documents to be
5 produced.

6 And as such, we believe that there's no
7 dispute that that falls within your Honor's ability to
8 centrally conduct discovery as embodied in the statute
9 that actually created the judicial panel on
10 multi-district litigation as well as the transferee
11 court's responsibilities. We hope to have that to you
12 shortly.

13 THE COURT: Okay.

14 MS. PARKER: The second issue to preview
15 there is we wondered whether or not the Court would want
16 to set now a time to hear any objections to those
17 subpoenas that are issued. The idea would be to provide
18 notice to the defendants as we send out the subpoenas
19 that the date of a hearing or a date by which any
20 objections should be filed. We would suggest that we
21 certainly could do this at the next status conference,
22 which is scheduled for July 18th.

23 We also think the timing contemplated, if
24 you give a two-week opportunity to object to the
25 subpoenas, it may be appropriate to have a hearing

1 around the first week of July.

2 THE COURT: All right. The only issue
3 there, that depends on a number of things happening, the
4 CMO being in place, a subpoena going out, my granting
5 this motion concerning the venue or jurisdiction for
6 enforcing them. It seems to me that July 18th is
7 probably the right date. If your question is what date
8 should be typed in so that things are lined up and ready
9 to go, I would type in July 18th.

02:14PM 10 MS. PARKER: Excellent, thank you, your
11 Honor.

12 THE COURT: I think it is optimistic to do
13 it before that. Why don't we handle it that way.
14 Anything else on the discovery efforts, Ms. Parker?

15 MS. PARKER: No, your Honor.

16 THE COURT: Anything else on discovery from
17 any other defendant or other interested party?
18 Mr. Fern, anything to add?

19 MR. FERN: Nothing to add, thank you.

02:15PM 20 THE COURT: Topic 4 is procedure for
21 transferring state cases pursuant to my order, which I
22 left, as you know, open-ended. I guess there are
23 several subparts, the first is which precise cases at
24 this point are subject to the order and what, if
25 anything, I need to do to effectuate the transfer of

1 those cases I have ordered transferred.

2 MR. FERN: Judge, I'm glad to report that
3 there are no such cases currently pending transfer where
4 one of the affiliated defendants are party together with
5 a local healthcare provider. We have a number of cases
6 that are in state court that you are aware of from our
7 last hearing in Tennessee and in Virginia.

8 There is one case, the Stewart case that is
9 in Alabama which we removed from state court. That was
02:16PM 10 a remand motion to be heard yesterday in that court, and
11 we basically, the papers we submitted were a copy of
12 your memo and order advising the Court that you had
13 ordered that case should be removed and brought here.

14 I assume that that Federal Court Judge will
15 abide by your prior order. Other than that, there are
16 no other cases that are currently pending which would be
17 subject to the order for transfer here.

18 THE COURT: Just to make it clear if I
19 didn't in my opinion, this is obviously a dynamic
02:16PM 20 situation in the sense that the lineup may change in a
21 particular case particularly, and I don't know how it's
22 going to play out, obviously, but if, for example, there
23 is some kind of bar date or something that prompts
24 actions in some of these cases where unaffiliated
25 defendants decide that they do want to make a

1 contribution on an indemnity claim against an affiliated
2 defendant, that may change the mix, but I'm going to
3 take this as they come, if they come.

4 So I think I hear you saying, Mr. Fern, that
5 at this point there's nothing for me to do?

6 MR. FERN: That's correct, Judge.

7 THE COURT: Music to my ears. Ms. Parker,
8 do you have any reason to disagree with that?

9 MS. PARKER: No, your Honor, I don't.

02:17PM

10 THE COURT: I do need to clear up for my
11 opinion, ARL Bio Pharma was unhappy that I listed them
12 as an affiliated entity. I will grant the motion to
13 correct my memorandum and order and issue a corrected
14 order by deleting the reference to ARL, which I think is
15 in footnote 1.

16 Anything else on that topic generally?
17 Ms. Parker.

18 MS. PARKER: No, your Honor.

19 THE COURT: Mr. Fern.

02:18PM

20 MR. FERN: No, Judge. When the situation
21 does arise, we've looked at this, and I don't believe we
22 even have to take that case and do a tag-along to the
23 JPML and then have a CTO issued. Based upon your order,
24 if that case can get removed to Federal Court either by
25 ourselves, if we are a party, or by the local healthcare

1 provider, it is hopeful that by providing a copy of your
2 decision to the Judge in that jurisdiction, that case
3 could be transferred here directly into the MDL.
4 Hopefully we can do that via cross-findings. If the
5 situation arises where we need the Court's assistance,
6 then we will take that next step.

7 THE COURT: All right. Does the trustee
8 want to weigh in on this, Mr. Gottfried?

9 MR. GOTTFRIED: Yes, we agreed with
02:18PM 10 everything else that's been said so far essentially.
11 There are no pending cases that we're aware of that
12 would be subject to your order that are not presently
13 here. We think this really is an issue with respect to
14 future cases, and it's our hope that certainly if it's a
15 case that we're directly involved in, we'll remove it
16 pursuant to your order, and we would expect that given
17 notice, the healthcare provider would do the same
18 subject to the categories of your order.

19 THE COURT: All right. Good, good, good.
02:19PM 20 Item 6.

21 MS. PARKER: So in the process of attempting
22 to -- this really is the defendant's issue. I'll
23 explain how I believe it is HIPPA written. In the
24 process of attempting to meet and confer with defendants
25 about proposed case management orders, we have realized

1 that it may make some sense to appoint a liaison for the
2 defendant groups, the unaffiliated defendant groups, let
3 me put it that way.

4 Now, the PSC does not have a position as to
5 whether there should be one additional liaison for the
6 national defendants and one additional liaison for the
7 pain clinics and health provider defendants, but we do
8 think it makes sense to have someone who occupies a
9 liaison role that we can reach out to and speak with in
10 the process of doing these things, and that is not
11 necessarily someone who would bind all of the defendants
12 but at minimum someone that we could reach out to who
13 could collect comments from those defendants and
14 interface with the plaintiffs' steering committee.

02:20PM

15 THE COURT: Remind me who I appointed as
16 state federal liaison because I've forgotten and don't
17 have it in front of me.

18 MS. PARKER: That's Mark Chalos, your Honor.
19 He is not with us today.

02:20PM

20 THE COURT: Okay. Is that a role that he
21 could fulfill or is that not appropriate?

22 MS. PARKER: Well, the idea, your Honor,
23 was --

24 THE COURT: This is liaison counsel, meaning
25 someone from -- well, you tell me. Go ahead. This is

1 not someone actually representing the affiliated
2 defendants or do I have that backwards?

3 MS. PARKER: We were suggesting that it
4 would be defense counsel for the defendants.

5 THE COURT: I'm sorry. So you have one
6 phone call to make, in other words?

7 MS. PARKER: Correct.

8 THE COURT: Then the question is how does
9 that process come about? I don't have -- at least my
02:21PM 10 belief is to the extent that there are defendants in
11 state cases, I don't have jurisdiction over them, but
12 presumably there are several who are named in cases over
13 which I do have jurisdiction, in other words, it's not a
14 coterminous set, right?

15 MS. PARKER: That's correct, your Honor.
16 There are, as I understand it, pain clinics that are
17 currently defendants in this MDL, although I concede I
18 don't have my service list in front of me, so I can't
19 tell you which.

02:21PM 20 MR. FERN: Judge.

21 THE COURT: Go ahead.

22 MR. FERN: This may not require action
23 today. I think it's a topic that we're bringing to the
24 Court's attention as we are negotiating the CMO
25 regarding discovery of nonaffiliated defendants as well

1 as discovery of the national defendants, from which I
2 spoke about before, it would be appropriate that they
3 have some input into the process on the CMO and future
4 CMOs as they are submitted to the Court, so this is
5 probably not ripe for today, but it was put on the
6 agenda to bring it to the Court's attention, so this
7 may, and Mr. Coren on behalf of the PSC had, I thought,
8 a very intelligent idea this morning that there might be
9 one liaison on behalf of the state defendants, all the
10 pain clinics and then another liaison on behalf of the
11 national defendants who would be more localized who had
12 done work or vendors at NECC.

02:22PM

13 If the Court goes that way and selects two
14 liaison counsels, then in addition to myself and
15 Mr. Moriarty and Ms. Nadel and others, this may then
16 turn into, Judge, as we have a plaintiffs' steering
17 committee, we may want to organize a defendants'
18 steering committee so everyone is on the same page and
19 we're able to coordinate our efforts on the defense side
20 of the table.

02:23PM

21 THE COURT: All right. It sounds in the
22 abstract like a good idea, and perhaps having two
23 liaison counsel, because they are somewhat differently
24 situated, the local vendors and so forth as opposed to
25 state or regional pain clinics or healthcare providers,

1 but I'll leave it, I will entertain any reasonable
2 proposal, and I'll leave it at that for now.

3 Anything further on that topic? Ms. Parker.

4 MS. PARKER: No, your Honor.

5 THE COURT: All right. Status of bankruptcy
6 proceedings.

7 MS. PARKER: I was going to direct it to the
8 trustee.

9 MR. GOTTFRIED: Well, here I am. Your
02:23PM 10 Honor, I want to report to you that Mr. Moore is
11 continuing to negotiate with so-called affiliated
12 defendants, believes that that process is progressing,
13 that he has requested and is obtaining additional
14 information from them, and he is satisfied that that
15 process is moving forward appropriately.

16 He is continuing to administer the estate,
17 collect the accounting receivables. He continues to get
18 product returns, he is rejecting leases, and as you may
19 have noted last night, the U.S. Attorney's Office and
02:24PM 20 Mr. Moore's office, we agreed to a form of notice with
21 respect to the motion to modify the preservation order.

22 I don't know if you've had a chance to look
23 at that, but that is something that we did negotiate
24 with the U.S. Attorney's Office, and both are satisfied
25 with that proposed order and form of notice, so long as

1 the Court is.

2 THE COURT: I will grant that motion and
3 issue the order in the proposed form with the notice
4 attached.

5 MR. GOTTFRIED: Thank you, your Honor.
6 Then, lastly, I would simply just inform the Court,
7 nothing to be done today, that Mr. Moore is working on a
8 bar date motion, and that's something that he's in
9 process, having reflected on the Court's decision.

02:25PM 10 THE COURT: Where do matters stand with
11 regard to the individual officers and so forth, the
12 trustee's efforts in that regard to "clawback," if
13 that's the right word, various funds from the
14 individuals?

15 MR. GOTTFRIED: That is the subject matter,
16 at least in part, of the discussions that are ongoing,
17 and those individual defendants are represented in those
18 discussions.

19 THE COURT: All right. Anything further on
02:25PM 20 that topic?

21 While we're on the subject of affiliated
22 companies, I still have pending various motions to
23 dismiss by Alaunus, which it makes me nervous to have
24 motions -- "nervous" isn't the right word, anxious,
25 perhaps, to have motions pending for a long period of

1 time without a plan for resolving them.

2 I don't know if it makes sense to put that
3 toward the top of the agenda or not, but they're
4 12(b)(6) motions that ordinarily I would take up early
5 on in the case and decide yes or no. It may be folded
6 in with the issue of the master complaint.

7 Does someone want to take up the issue of
8 how I address that? Yes, sir.

9 MR. CIPORKIN: Yes, your Honor,
02:26PM 10 Ryan Ciporkin for Alaunus Pharmaceutical. Given the
11 status of the ongoing discussions between the trustee
12 and the affiliated defendants, where Alaunus is simply,
13 I think the word I used, "forbearing" on its motions to
14 dismiss for the time being, and we've already discussed
15 a provision in the CMO where there would be a temporary
16 stay on the response deadlines, which could be
17 terminated in the event that, you know, there would be
18 other conditions, but essentially the Court won't need
19 to take, excuse me, any action on the motions right now.

02:27PM 20 I'm not suggesting that the Court deny the
21 motions but just leave them on the docket for the time
22 being.

23 THE COURT: All right. I will leave that
24 where it is, and to the extent that I have been rolling
25 over response dates generally to complaints or motions

1 to dismiss, they'll be rolled over again to the next
2 status on July, is it, 18th?

3 THE CLERK: Yes.

4 THE COURT: I will have the clerk's note
5 reflect that as well so everyone is protected in that
6 regard.

7 MR. CIPORKIN: Thank you, your Honor.

8 THE COURT: Anything else on that issue?

9 MS. ANDREWS: Your Honor --

02:27PM

10 THE COURT: Yes.

11 MS. ANDREWS: -- a short report from
12 counsel, Mr. Molton, who speaks for our committee, but
13 I'm going to go first this time. From the creditors'
14 committee, we want the Court to know that a Herculean
15 effort over the past two weeks has gone on merging the
16 interests and the personnel of the plaintiffs' steering
17 committee and the creditors' committee to align in a
18 very important way for the goals that are being rolled
19 out through CMO, very important people worked this
20 morning, Ms. Parker, Mr. Coren, others in the room,
21 attended a very long meeting with defense counsel and
22 made progress on one of the biggest case management
23 orders I have seen tackled in an MDL to get this case
24 moving quickly.

02:28PM

25 That's the report from our side that for

1 these interested parties, and we represent all
2 creditors, that the cost saving of this type of work for
3 the creditors and victims of this case is enormous, and
4 we're looking forward to getting this case management
5 order out to you very quickly.

6 THE COURT: Thank you, I appreciate that.
7 Number 8, product identification.

8 MR. FERN: Judge --

9 THE COURT: Mr. Fern.

02:29PM

10 MR. FERN: -- Number 8 and 9 on the agenda
11 basically can be dealt with simultaneously. The Court
12 has spoken numerous times since our first appearance
13 before you regarding identification of the product that
14 the claimants were exposed to. The only way that's
15 going to happen, Judge, is to have access to the
16 plaintiffs' medical records to confirm that they were
17 injected with an NECC compounded product within I'll say
18 the appropriate time frame.

02:29PM

19 I think the plaintiffs' side will disagree
20 with me on the time frame, and there is also some
21 disagreement as to whether or not we are looking at
22 methylprednisolone acetate only or whether we are
23 looking at other products, whether they be cardioplegic,
24 sulphamic, but we'll leave that for another day.

25 I have taken on the responsibility, and I

1 had obtained a number of proposals from I think three
2 different national corporations who will agree to gather
3 the records for us, and this would be a joint effort.

4 The beauty of this, Judge, both the
5 plaintiffs and the defendants would have access to the
6 records in order to minimize the cost to both the estate
7 and the plaintiffs' side. The records would then be put
8 online to be worked out as to how and who would have
9 access via password, and the cost sharing would also be
10 worked out.

02:30PM

11 I have submitted those three proposals to
12 the plaintiffs' steering committee. I hope that they've
13 been shared with other members of the committee. I'm
14 waiting for word back. I thought this was the best way
15 to go, having been involved in doing this in other MDLs,
16 including in Vioxx, there was a sharing of medical
17 records.

18 In another case I'm involved with, another
19 MDL I'm involved with in New Jersey, we have shared the
20 medical records, though we only have 191 cases before
21 the Court at the moment, and we anticipate hundreds
22 more, I was of the opinion -- and I may be the only
23 one -- that there's no reason why not to get started on
24 this effort now and not wait for the deluge of multiple
25 cases to be filed in anticipation of the bar date.

02:31PM

1 THE COURT: And, again, just to restate, you
2 know, what I was trying to communicate is these records
3 are what they are. They exist. One way or another
4 they're going to have to be collected somehow at some
5 point no matter what the forum is. The plaintiff will
6 have to come forward, and the defendants will have to
7 access what is the evidence that they were exposed to an
8 NECC product and what injury resulted from that, and I
9 didn't see any reason to hold off on that particularly.

02:31PM

10 If we could make headway on it, and as long
11 as you all are paying attention to it, what Mr. Fern
12 proposes may or may not be the right approach, but I
13 don't see any particular reason for delay because even
14 with "only 191 cases," there's still a lot of work to be
15 done, I would assume a lot of medical providers and so
16 forth, you know, where medical records have to be
17 collected, releases have to be executed and so on. I'm
18 sure there's work that needs to be done.

02:32PM

19 MR. FERN: Judge, if we can, I will continue
20 to negotiate with the steering committee. We will
21 select, hopefully, a vendor or have further negotiations
22 with a vendor to get to a price that we are both content
23 with and see if we could start that process, which would
24 then require also negotiating on a form of release on
25 authorization that would then have the vendor's name to

1 be receiving all of the records. They would have the
2 originals. They would be scanned, they would be made
3 available to both sides simultaneously. There would be
4 no analysis, it would just be the pure records online
5 available to both sides at sharing of the cost.

6 THE COURT: All right. Ms. Parker, do you
7 want to weigh in here?

8 MS. PARKER: From the plaintiffs' steering
9 committee's perspective, your Honor, there is no
02:33PM 10 question that the product identification records and
11 medical records will need to be produced in this MDL.

12 We also have no objection in principle to
13 sharing medical records with the defendants, assuming
14 that we can iron that out and come to a workable
15 arrangement. We have Mr. Fern's proposals, and we will
16 review those and get back to him. Mr. Fern asked the
17 question, Why not get started now? I'd like to speak to
18 that for a moment, if I may.

19 THE COURT: Okay.

02:33PM 20 MS. PARKER: We know that these information
21 have to be produced. We know that they will be produced
22 in the context of a bankruptcy bar date. We know the
23 claimants will be required to provide that information
24 a, hopefully, short time down the road. The reason that
25 we may or may not want to do it now has to do with cost,

1 and that is both the cost of producing the records but
2 also for counsel in reviewing the records, for
3 contacting clients to walk them through the process of
4 all of this, and no one is suggesting that those costs
5 would be inappropriate, but we do come from the
6 perspective of recognizing that this is a limited fund
7 case and that the plaintiffs' steering committee and
8 others, the creditors' committee -- I won't speak for
9 the trustee or the defendants -- but certainly we're
10 all, I think, working on the assumption that we want to
11 maximize the return to the plaintiffs in a limited fund
12 scenario.

13 From our perspective, we appreciate the
14 defendants who are electing to litigate cases as opposed
15 to those defendants who were involved in the trustee
16 settlement process may want to push aggressively for
17 medical records now so as to be able to litigate those
18 cases. We don't understand, to be frank, the need from
19 NECC's perspective to request this information now. We
20 expect it will be produced shortly in relation to the
21 bar date motion.

22 THE COURT: All right. I don't intend to
23 micromanage this until I need to. I express no opinion
24 as to whether it's desirable to do it now, tomorrow or
25 the day after tomorrow or as to what format it has to be

1 done in. I'm content to hear at this point that you are
2 both actively considering the issue and take into
3 account, as I think you should, various factors
4 including the fact that this has to be done inevitably,
5 but you also want to minimize cost and inconvenience,
6 and presumably you do need to prioritize something,
7 whatever that thing is.

8 I'll leave it at this point to your
9 collective judgment and negotiation as to how to
02:35PM 10 proceed. I'm going to leave it at that for the time
11 being.

12 MS. PARKER: Thank you.

13 THE COURT: All right. Is that it? Are
14 there other things that we need to talk about?
15 Ms. Parker.

16 MS. PARKER: I was remiss in not listing the
17 preservation order issues on today's agenda, but I
18 believe Mr. Gottfried has addressed those.

19 MR. GOTTFRIED: Yes, thank you.

02:36PM 20 MS. PARKER: The only other issue that I'd
21 bring to the Court's attention is really a plea from the
22 plaintiffs' steering committee, which is perhaps your
23 Honor could mention in his minute order that all counsel
24 for defendants whose cases are now in the MDL should
25 enter a notice of appearance so that we are then able to

1 track them and find them and include them in our
2 negotiations.

3 THE COURT: So ordered.

4 MS. PARKER: Thank you.

5 THE COURT: And if there are any other
6 management-type details like that that need to be
7 addressed, don't hesitate to raise them. You can
8 contact Mr. Cicolini, you don't need to wait for our
9 monthly status conferences. That is exactly the kind of
02:37PM 10 thing that will drive all of us crazy if we aren't
11 paying close attention and crossing the Ts and dotting
12 the Is.

13 Every counsel representing a party has to
14 enter an appearance. We need to have a master list. We
15 need to know who is in, who is not, who represents what
16 party and so on. It will be utterly unworkable if we
17 don't have that accurate and up-to-date information.

18 Anything else from the plaintiffs?

19 MS. PARKER: No, thank you, your Honor.

02:37PM 20 THE COURT: From the creditors' committee?

21 MR. COREN: No, your Honor.

22 THE COURT: Trustee?

23 MR. GOTTFRIED: Nothing further, your Honor.

24 THE COURT: Any defense counsel?

25 MR. MORIARTY: Just one item, your Honor.

1 THE COURT: Yes.

2 MR. MORIARTY: In the way of expectation
3 management, we've been talking a lot about the CMO
4 today. It was 22 pages long in its draft. What we have
5 found in the meet and confer process is that some of
6 those are more urgent than others and some require more
7 work than others, so what you may actually get is CMO1
8 and then followed by --

9 THE COURT: I think CMO, I think we're up to
02:38PM 10 No. 7 or 9.

11 MR. MORIARTY: Several other shorter ones.

12 THE COURT: Put the right number on it,
13 okay, yes.

14 MR. MORIARTY: So you may get these in a
15 sequence, I just wanted you to know so you weren't
16 expecting some tome at the beginning.

17 THE COURT: That's fine as well. I would
18 rather resolve those issues that can be resolved
19 quickly, and if we need to defer on others, that's fine,
02:38PM 20 too. All right.

21 (Discussion held off the record.)

22 Mr. Cicolini was just telling me that if
23 every attorney has entered an appearance, that means
24 every time we do anything, we have to send notifications
25 to every attorney, and the system bogs down. One might

1 think in 2013 we could handle a data problem like this,
2 but I think we need to have everyone enter an
3 appearance. It may be that we provide notice in some
4 different way, maybe through liaison counsel. There may
5 be other ways that we handle this. If I have to issue
6 an order to expedite matters, I will, but I do think
7 it's important that we know which lawyers represent
8 which parties and that we have a record of that.

9 All right. I think our next meeting is
02:39PM 10 July 18th. Did I schedule one beyond that?

11 THE CLERK: Yes, August 9th.

12 THE COURT: What about for September?

13 THE CLERK: Not yet.

14 THE COURT: Why don't we find a date in
15 September before it gets all clogged up.

16 THE CLERK: September 12th at 2:00.

17 THE COURT: September 12th at 2:00. The
18 Jewish holidays are unusually early this year. When
19 does Yom Kippur start, on the sundown on the 12th?

02:40PM 20 MR. FERN: On the evening of the 13th.

21 THE COURT: It starts the 13th?

22 MR. FERN: The evening of the 13th.

23 THE COURT: So the 12th is okay?

24 MR. FERN: Yes.

25 THE COURT: September 12th at 2:00. We'll

1 put that in the calendar as well. Anyone else want to
2 be heard on any other topic? All right. Thank you,
3 all.

4 MS. PARKER: Thank you, your Honor.

5 MR. FERN: Thank you, Judge.

6 (Whereupon, the hearing was adjourned at
7 2:40 p.m.)

8 C E R T I F I C A T E

9
10 UNITED STATES DISTRICT COURT)
11 DISTRICT OF MASSACHUSETTS) ss.
12 CITY OF BOSTON)
13

14 I do hereby certify that the foregoing
15 transcript, Pages 1 through 35 inclusive, was recorded
16 by me stenographically at the time and place aforesaid
17 in MDL NO. 13-02419-FDS, IN RE: NEW ENGLAND COMPOUNDING
18 PHARMACY CASES LITIGATION and thereafter by me reduced
19 to typewriting and is a true and accurate record of the
20 proceedings.

21 Dated this June 24, 2013.

22 s/s Valerie A. O'Hara

23 _____

24 VALERIE A. O'HARA

25 OFFICIAL COURT REPORTER